A AMFINANCE BHD

v.

BEVERINK SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-1790-2003]
13 JANUARY 2006

C CIVIL PROCEDURE: Summary judgment - Appeal against - Contract of indemnity under s. 77 Contracts Act 1950 - Failure of one individual to sign indemnity - Whether affects liability of second and third defendants - Repossession of sewing machines - Whether proper - Whether plaintiff exercised due diligence in selling machines by way of D tender - Whether there was impropriety on plaintiff's part

This was the defendants' appeal against the decision of the senior assistant registrar (SAR) granting the plaintiff's summary judgment application under O. 14 of the Rules of the High Court 1980. The plaintiff's claim was for the amount of RM309,354.97 for hire E purchase of 88 units of used sewing machines. The second and third defendants were co-indemnifiers under an indemnity of the hire purchase agreement. The first defendant had defaulted in payments. On 28 October 2000, the plaintiff repossessed 43 sewing machines and obtained RM13,350.42 from net sales of the F machines leaving a balance of RM309,354.97 due and owing. The issues that arose were (1) whether the failure of one Ang Teck Leong to sign the indemnity affected the liability of the second and third defendants; (2) whether the repossession of the sewing G machines was defective and (3) whether there was evidence of impropriety on plaintiff's part.

Held (dismissing the defendants' appeal):

(1) The Indemnity of Hire Purchase Agreement ('TWS3'') was a H contract of indemnity under s. 77 of the Contracts Act 1950. It does not matter whether the letter of offer was for a joint and several guarantee indemnity. Eventually what was signed was an Indemnity of Hire Purchase Agreement on 21 January 1997. The second and third defendants could have refused to I sign the indemnity if they had insisted so as per the letter of offer. Therefore the failure of one Ang Teck Leong to also sign the indemnity does not affect the liability of the second

and third defendants. The liability herein was that of an indemnifier which was unaffected if a co-indemnifier does not sign it. An indemnity is a primary undertaking and s. 97 of the Contracts Act is a reiteration of the common law position that it does not apply to a contract of indemnity. (paras 16 & 18)

(2) The repossession of the sewing machines was proper as the first defendant was notified. This was followed by a notice of demand that was served on all the defendants. The contemporaneous documents showed that the repossessed sewing machines were the subject matter of the hire purchase agreement. (para 19)

(3) The plaintiff had exercised due diligence in selling the machines by way of tender notice. The plaintiff had advertised the sale by tender in the Nanyang Siang Pau on 20 July 2001. The defendants had not shown any evidence of impropriety on the plaintiff's part. (para 20)

Case(s) referred to:
CGU International Insurance PLC v. Quah Boon Hua & Ors [2000] 4 SLR 606 (refd)
Indian Bank v. Raja Suria & Ors [1993] 2 SLR (refd)

Legislation referred to:
Contracts Act 1950, ss. 77, 78, 79, 97
Rules of the High Court 1980, O. 14

For the plaintiff - Hargopal Singh (CK Law with him); M/s Hargopal Singh & Co
For the defendant - HH Tay (HS Ng; M/s Tay & Helen Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

[1] This is the defendants' appeal against the decision of the senior assistant registrar granting the plaintiff's summary judgment application under O. 14 of the Rules of the High Court 1980.

[2] The plaintiff's claim is for the amount of RM309,354.97 for hire purchase of 88 units of used sewing machines. The hire-purchase was for the amount of RM489,800. A deposit of RM68,400 was paid under the agreement, leaving a balance of

A RM421,400 payable. That balance is to be paid in 35 installments of RM11,706 and a final installment of RM11,690. The installments commenced on 25 February 1997. The 2nd and 3rd defendants are co-indemnifiers under an indemnity of the hire purchase agreement dated 21 January 1997.

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[3] The 1st defendant defaulted in payments. On 28 October 2000 the plaintiff repossessed 43 sewing machines and obtained RM13,350.42 from net sales of the machines leaving a balance of RM309,354.97 due and owing.

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[4] The issues raised by the defendants are firstly, the 2nd and 3rd defendants are discharged as guarantors since the plaintiff had contravened s. 97 of the Contracts Act which reads:

> Where a person gives a guarantee upon a contract that the creditor
> D shall not act upon it until another person has joined in it as co-surety, the guarantee shall not be valid if that other person does not join.

[5] This point was raised because the 2nd and 3rd defendants subsequently discovered that one Ang Teck Leong did not sign as
E guarantor. The defendants submitted that it was a condition precedent that all three individuals, ie, the 2nd defendant, the 3rd defendant and Ang Teck Leong would sign the indemnity. Ang Teck Leong did not sign, even though his name appears on the
F document. The defendants said that since Ang Teck Leong did not sign, they are not liable.

[6] The defendants cited the case of CGU International Insurance PLC v. Quah Boon Hua & Ors [2000] 4 SLR 606, where it was held that by making a provision for all three directors of the 3rd
G defendant to sign, the plaintiffs represented to the 1st defendant that the plaintiffs required all three directors to sign the letter of indemnity. The learned judge in that case accepted the evidence of the 1st defendant minority shareholder that in signing the indemnity, he did so under the impression that all three directors
H were expected to sign the document. As the 3rd director did not sign the indemnity, it was held that the indemnity would have no legal effect as against the 1st defendant.

[7] The defendants also contended that cl. 2(g) of the
I Indemnity of Hire Purchase Agreement ("TWS3") is not applicable as Ang Teck Leong is not a 3rd party or any other 3rd party to the indemnity agreement. Ang Teck Leong is in fact a party to the

indemnity agreement. The name Ang Teck Leong is spelt out as co-signatory. Thus, the plaintiff could not rely on cl. 2(g) to excuse the failure of Ang Teck Leong to sign the indemnity agreement.

[8] The second issue is that the repossession is defective. The plaintiff was alleged to have repossessed machines that are not the subject matter of the agreement ("BVR1", encl. 1).

[9] The defendants also contended that no due diligence was exercised in selling the sewing machines to obtain the best possible price to protect the interest of the indemnifier. There was no independent valuer.

[10] In reply to the first issue, the plaintiff said that TwS3 is a pure indemnity and not a guarantee. Section 97 of the Contracts Act refers to guarantee. It is only applicable to guarantees and not to indemnities. The plaintiff's learned counsel made references to Pollock & Mulla – Indian Contracts & Specific Relief Act (12th edn) on the nature of a contract of indemnity and guarantee.

[11] Learned counsel cited s. 77 of the Contracts Act that defines an indemnity, followed by s. 78 that discusses the rights of the indemnity holder. The indemnifier is referred to as "the promisor" and the indemnity holder "the promisee". In s. 79 a guarantor is defined and referred to as "the surety" and the guarantee holder as "the creditor."

[12] Alternatively, the plaintiff submitted that if the court decides that s. 97 applies, reference should be made to cl. 2(g) of TW3: "... That we are fully aware of the terms and conditions contained herein and that none of us have agreed to enter into this indemnity on condition that any other 3rd party shall join as co-indemnifier. Accordingly, no failure of any 3rd party to stand as additional indemnifier or to execute this indemnity shall prejudice this indemnity." The word "co-indemnifier" is used in TW3. The word "guarantor" does not appear anywhere.

[13] To the second issue, the plaintiff replied that TwS2, the hire purchase agreement listed the goods hired. LBH 790 is listed as No. 21. It tallies with "BVR1". The plaintiff's learned counsel contended that defendants has failed to show evidence to support the allegation. The defendant has failed to make any police report

on the plaintiff's alleged wrongdoing. All the defendants did was to produce a list of equipments on a plain piece of paper ("BVR1").

[14] As for the third issue, the plaintiff said that the statement of accounts as at 29 August 2003 includes the sales proceeds. The respondents were aware of it but they did not raise any complaint. The respondents were informed of the repossession as in "TWS7" to encl. 9. It was a sale by tender as evidenced in "TWS8".

[15] Upon hearing submissions from both sides, I dismissed the defendant's appeal with costs and upheld the summary judgment in favour of the plaintiff. I decided as such for the following reasons.

[16] Firstly, I find that "TWS3" is a contract of indemnity under s. 77 of Contracts Act. It does not matter whether the letter of offer was for a joint and several guarantee and indemnity. Eventually what was signed was an indemnity of hire purchase agreement on 21 January 1997. The 2nd and 3rd defendant could have refused to sign the indemnity if they had insisted so as per the letter of offer. Therefore the failure of Ang Teck Leong to also sign the indemnity does not affect the liability of 2nd and 3rd defendant. I refer to the excerpt from Pollock and Mulla (12th edn) at p. 1744:

> Under a contract of indemnity, the indemnifier undertakes an independent obligation, which does not depend upon the existence of any other obligation of any obligor ...

[17] In dealing with guarantee it was said further that:

> A surety who enters into the obligation on the understanding and faith that another person would also enter into it ... has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety (Evans v. Bremridge [1855] 44 ER 327, Per Turner LJ). The rule will not be extended to cases of joint and several obligations where the transaction is not really a guarantee, but a primary undertaking (Exparte Harding [1879] 12 Ch D 551).

[18] Further, the Contracts Act 1950 makes a clear distinction between a guarantee and an indemnity. Section 77 and 78 of the Act deals with indemnities whereas s. 79 is about guarantees. These provisions are statutory enactment of the common law

position of guarantees and indemnities and the liability of a 'surety' and 'indemnifier' respectively. As such the case of C G U International Insurance PLC that the defendant cited has no application here. The case of Indian Bank v. Raja Suria & Ors [1993] 2 SLR referred to and followed there is in respect of a joint and several guarantee not an indemnity. Where an instrument of guarantee is in the form or term that imply it is to be executed by more than one guarantor who are to be jointly and severally liable, it is not a rule of law that all must sign the instrument before anyone is bound but rather what was the intention of parties. So where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if the other person does not join (see s. 97 Contract Act). In this case before me the liability is that of an indemnifier which I hold is unaffected if a co-indemnifier does not sign it. An indemnity is a primary undertaking and s. 97 of our Contract Act is a reiteration of the common law position that it does not apply to a contract of indemnity. As it is an indemnity, the 2nd and 3rd defendants are liable notwithstanding that the said Ang Teck Leong did not sign it.

[19] I hold that the repossession of the sewing machines is proper. The 1st defendant was notified of this repossession. This was followed by a notice of demand that was served on all the defendants. The contemporaneous documents show that the repossessed sewing machines are the subject matter of the hire purchase agreement.

[20] Lastly, I am satisfied that the plaintiff had exercised due diligence in selling the machines by way of tender notice. Plaintiff had advertised the sale by tender in the Nanyang Siang Pau on 20 July 2001. The defendants had not shown any evidence of impropriety on the plaintiff's part.

[21] For all the above reasons, I dismissed the defendant's appeal with costs.